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No. 600

In the Supreme Court of the United States

OCTOBER TERM 1958

WALTER D. HART AND JACK HART, PETITIONERS

v.

SELECTED INVESTMENTS TRUST FUND, LINWOOD O. NEAL, TRUSTEE; SELECTED INVESTMENTS CORPORATION, AN OKLAHOMA CORPORATION; PAUL C. DUNCAN, TRUSTEE IN BANKRUPTCY OF SELECTED INVESTMENTS CORPORATION AND SELECTED INVESTMENTS TRUST FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 5b–15b)[2] is reported at 260 F. 2d 918. The District Court filed no opinion.

[1] The Securities and Exchange Commission is a party to the reorganization in the District Court pursuant to Section 20[a] of the Bankruptcy Act (52 Stat. 894) and participated as an appellee in the Court of Appeals.

[2] "Pet." refers to pages of the petition or the appendix thereto.

JURISDICTION

The judgment of the Court of Appeals (Pet. 16b) was entered on October 14, 1958, and a petition for rehearing was denied on November 10, 1958 (Pet. 16b). The petition for a writ of certiorari was filed on December 24, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court, under Chapter X of the Bankruptcy Act, may determine that public investors are creditors, despite provisions in the certificate bonds consistent with those of an equity security, and may disregard the separate entities of the corporation and the trust fund where the corporation's only business is the management of its "Trust Fund," from which its officers have been diverting assets, and it has sold certificate bonds therein to public investors, leading them to believe that they were lending their money to the corporation.

2. Whether the interests of public security holders would be "best subserved" by dismissing the Chapter X proceeding in favor of a state receivership proceeding where the record indicates the need for an independent trustee to conduct further investigation and to enforce possible causes of action against management for faithless stewardship, and there is no showing that reorganization cannot be effected.

3. Whether security holders, who did not file a timely answer to a Chapter X petition but in the exercise of the reorganization court's discretion were afforded a hearing at which they were permitted to sub-

mit evidence and did introduce documentary evidence, were deprived of any substantial procedural right.

STATUTE INVOLVED

The pertinent provisions of the Bankruptcy Act (52 Stat. 883, 11 U.S.C. 501, *et seq.*) are set forth in the appendix to the petition (Pet. 1b–4b).

STATEMENT

The essential facts of this case are not in dispute. They appear from the uncontroverted evidence before the District Court in the bankruptcy and reorganization proceedings, and the findings of that court were affirmed by the Court of Appeals.

Selected Investments Corporation (Corporation) was incorporated in 1930 by Hugh A. Carroll (Carroll), who became its president and has always controlled it (R. 130, 133).[3] Its only business has been to manage, control, and to sell certificates of Selected Investments Trust Fund (Trust Fund), also a Carroll creation (R. 29). The evidence shows that investors were led by the Corporation to believe that they were lending their money, and that the "certificate-bonds" which they received were actually bonds with a fixed interest rate of 6% and were redeemable, after three years from the issuing date, on demand at face value (R.106–8, 113–114, 198). Until 1957, the Trust Fund paid the promised 6% per annum, represented as interest, regardless of actual earnings (R. 113–114); and Carroll admitted that it had been necessary, on oc-

[3] References to the transcript of record in cases Nos. 5854 and 5950 in the court below, filed by petitioners herein, are designated "R. —".

casion, to pay this 6% "interest" out of capital (R. 144). In addition, all "bonds" over three years old were redeemed, upon presentation, in cash at their face value (R. 113–114, 144).

The "Series O" certificates (R. 27–29)[4] are prominently labeled "CERTIFICATE BOND", and the words "certificate-bond", "bond" and "bondholders" are used in it extensively. The purchase price is referred to as "face value", and the outer side bears the phrase "Payable at Office of Linwood O. Neal, Trustee, Oklahoma City, Oklahoma". There are, it is true, several references to "distributive share" and to an "indenture", which contains provisions inconsistent with a debt security, but the record shows that purchasers were not shown the indenture (R. 107), that it was, at most, purportedly available for inspection at the office of the trustee (R. 27), and that it is a complex, legalistic document, many pages long (R. 170–186; A. 27a–34a)[5] which would be extremely difficult for the average layman to understand.

The bankruptcy and reorganization proceedings were precipitated by a ruling of the Internal Revenue Service, in 1957, that thereafter the income of the Trust Fund would be treated for tax purposes as corporate income, and that payments to the "certificate-bond" holders would no longer be considered as deductible items. On December 10, 1957, after this

[4] Although five separate series of certificates (A, O, E, F and G) were issued, 91% of them were in "Series O" and 7% in "Series A" (R. 31–33). The certificates in these two series are virtually identical.

[5] The appendix to petitioners' brief in the court below, which has been filed in this Court, is referred to as: "A. —".

ruling—and purportedly because of it—Carroll suspended redemption of all outstanding certificates (R. 144–148).

Shortly after the suspension, certain certificate holders filed a suit in the state court in Oklahoma County against the debtors for the appointment of a receiver (R. 192) and, on January 13, 1958, receivers were appointed (R. 189). The Oklahoma court directed that financial reports covering the Corporation and the Trust Fund as of October 31, 1957, then in preparation by independent accountants at Carroll's request, be transmitted to that court (R. 156–159). The report on the Trust Fund—on the basis of its own books and records—showed net assets of $27.8 millions against outstanding certificates bearing a total face value of more than $39 millions. The accountants, moreover, refused to certify the balance sheet because of their doubts: (1) as to the legality of the division of income, expenses, and management fees among the Corporation, the Trust Fund and affiliated companies; (2) as to the propriety of certain transactions involving the Trust Fund, and officers of the Corporation; and (3) as to the ultimate realization upon the large loans to officers of the Corporation and affiliated companies.

Nevertheless, on February 21, 1958, the Trust Fund and the Corporation, still under Carroll's control, interposed an answer to the receivership suit, suggesting a method of reorganization which would have kept the Corporation in substantial control of the Trust Fund (R. 21–26), and Carroll circularized the certificate holders, in the name of the Corporation,

soliciting support for his proposed reorganization (R. 161–167).

On February 27, 1958, five certificate holders, asserting claims in the amount of the $19,000 face value of their certificate-bonds, filed an involuntary petition in bankruptcy against the Corporation in the United States District Court for the Western District of Oklahoma, on the ground that, "while insolvent or unable to pay its debts as they mature", it had permitted the appointment of a receiver, and had thus committed an act of bankruptcy (R. 1–2). A hearing on the petition was held February 28, 1958 (R. 83), at which time the Corporation answered, denying the allegations of the petition and specifically denying that the relationship between the certificate holders and the Corporation was that of debtor and creditor. The same position was taken on behalf of the Trust Fund (R. 93). The court continued the hearing to March 3, 1958.

On the adjourned date, however, counsel for the Corporation and the Trust Fund reversed the position they had theretofore taken and stated: "* * * the relation of creditor and debtor does exist here under the facts" and: "We can not pay them in cash their *pro rata* share without liquidating the corporation, or the trust, rather, at a great loss" (R. 103, 108). The court then heard testimony, which has never been contradicted, that purchasers "never saw the trust contract [kept] in [the] office" and that they had relied on the representations of the Corporation's agents that they were lending their money and would be repaid on demand (R. 106–108). All counsel present, including counsel for the Corporation and Trust

Fund, agreed without qualification that additional witnesses would have testified similarly (R. 107). The court thereupon found that the necessary relationship of debtor and creditor existed and indicated that it would assume jurisdiction (R. 111).

On the same day, the Corporation and the Trust Fund filed a petition under Chapter X (R. 15–17) alleging that the face amount of outstanding certificates was $39,038,139, while the book value of the assets was only $28,848,791; that the Trust Fund was unable to pay the certificate holders even their proportionate shares of its assets; and that reorganization was essential to prevent "great loss and irreparable damage" (R. 16). Although the petition alleged that the Trust Fund and Corporation were separate entities and requested reorganization of the Trust Fund only, counsel representing both the Corporation and the Trust Fund agreed, in open court, that the assets of both would be submitted to the reorganization court for purposes of the proceeding (R. 116).

On March 3, 1958, the District Court approved the Chapter X petition, and appointed a trustee of both the Corporation and Trust Fund. It found upon "the testimony presented at the hearing * * * that the actual intent and understanding of all parties to the instruments was that a debtor-creditor relationship was created thereby"; that "the certificates issued were evidences of indebtedness"; and that "the corporation is insolvent and unable to pay its debts as they mature." Accordingly, it concluded that "the corporation and its purported trust should be adjudged

bankrupt and that the petition for reorganization should be approved" (R. 74–76).

The Trustee, following his appointment and pursuant to his investigatory duties, questioned Carroll at length. From his testimony it appears that the Trust Fund, although managed on paper by a "trustee"; was, in fact, managed by Carroll for his personal benefit and that of his immediate family and a few close associates (R. 114–117); that Carroll used Trust Fund money to finance companies owned by him; that he borrowed heavily from the Trust Fund; that he channelled its funds into the Corporation under the guise of fees; that he used Trust Fund money to build himself a house, without a note and rent-free (R. 141–142); and that on one occasion caused $150,000 of the Fund's money to disappear under circumstances which, at the least, must be characterized as incredible (R. 117–119, 136–141).*

* Some of the self-dealings to which Carroll testified are as follows:

(1) Carroll, his wife, his son-in-law, Rigg, and one Mollett purchased the Chickasha Finance Company in 1940 for a total of $6,500, of which Carroll and his wife put in $3,200 (R. 121–3). The Trust Fund supplied all the operating capital, at least $385,000 (R. 122), but the profits went to the owners, each of whom drew out at least $3,000 per year (R. 122). The stock which Carroll and his wife held in the Finance Company had, by his own admission, become worth at least $72,500 (R. 122–123). When asked about his profits (over 2165%) in this transaction, Carroll answered: "is there anything wrong with that?" (R. 123).

(2) Carroll, his wife, Rigg, and the auditor of the Trust Fund, Hedges (See R. 161, 163), put $1,000 each into the Home Building and Supply Company, to which the Trust Fund advanced at least $1,216,701 (R. 124). Carroll did

The order appointing the Trustee set May 2, 1958, as the date for the hearing on any objections to his retention in office,[7] and hence any answers to the peti-

not recall his profits, but stated that he and Mrs. Carroll both drew salaries from this corporation (R. 125).

(3) A number of the Trust Fund's business activities used insurance, so Carroll, his wife, and Rigg, as "silent partners", purchased an insurance agency to handle such insurance (R. 126–128).

(4) Carroll purchased the Beacon Life Insurance Company with $11,000 of his own money and $50,000 borrowed from the Trust Fund (R. 120).

(5) Carroll, Mrs. Carroll, and Rigg formed Selected Investments Mortgage Company and operated it with funds advanced by the Trust Fund (R. 129). The Trust Fund owned 99% of the capital stock. Carroll admitted that, on February 28, 1958, during the bankruptcy hearing and while the state court was endeavoring to conserve the assets through its receivership, the directors declared dividends to Carroll, his wife, and Rigg in the amount of $2,400 each. Carroll's explanation was that these funds came from $27,000 paid by an insurance company to the mortgage company as a penalty for withdrawing from a contract (R. 129–130).

(6) The disappearance of $150,000 of the Trust Fund's money occurred in the "Pierre Laval" transaction (R. 117–119, 136–141). According to Carroll, in April 1957, on his own initiative, he had $200,000 withdrawn from the Trust Fund bank account in $100 bills and delivered to him; he took the money in his car to Canada where he met a man, Pierre Laval, whose address he did not know and whom he could not thereafter locate, and he handed him $150,000 in bills in "something similar to a sack", "out in the open" with no one else around, for an "option" not further described. Under questioning by the court, Carroll stated: "I think what I did, Judge Chandler, is just bought the Brooklyn Bridge, when I think about it" (R. 141).

[7] Sections 161 and 162 require that creditors, stockholders, indenture trustees, the Securities and Exchange Commission and such other persons as the judge may designate shall be given at least 30 days notice by mail of a hearing at which

tion were due prior to that date. No such answer was filed prior to the hearing but a "Petition by Non-Petitioning Creditor to Vacate Adjudication" was filed on behalf of a law firm, O'Bryan, O'Bryan & O'Bryan, which claimed to be entitled to over a million dollars in legal fees (A. 1a). Nowhere in the record does it appear that the O'Bryans made any effort, at the hearing with respect to the retention of the trustee or otherwise, to have their "petition"[8] determined by the court. On June 23, 1958, petitioners were permitted to join in the O'Bryan petition and to file an answer on their own behalf. In view, however, of the other parties' protests and petitioners' admission that they had known about the O'Bryan "petition" for about a month (A. 15a), the court conditioned the acceptance of petitioners' answer upon an immediate hearing of the issues. A hearing was thereupon held: the District Judge inquired whether petitioners wished to offer evidence, and they introduced documentary evidence (A. 15a-18a). The court did not require that the evidence in support of the bankruptcy and reorganization petitions be introduced again, and petitioners made no specific request that this be done or that the witnesses who had previously testified in support of the petitions or in the trustee's investigation be made available for cross-examination. No witnesses were called by petitioners, and the court, after pointing

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the judge may hear objections to the retention in office of a trustee. Section 137 provides that at any time prior to the first date set for the Section 161 hearing an answer may be filed controverting the allegations of the Chapter X petition.

[8] It had been filed April 15, 1958 (A. 14a).

out that all of petitioners' evidence was in the record, overruled their objections. On appeal, the Court of Appeals affirmed the orders of the District Court.

ARGUMENT

The Court of Appeals was correct in affirming the decision of the District Court. No important problems concerning the administration of Chapter X or the reorganization process as administered in the federal courts are raised by the petition for certiorari. The opinion of the Court of Appeals shows that its decision was based on the debtors' fraud in the sale of the certificate-bonds to the public and on the misconduct of the Corporation and its officers in handling the assets of the Trust Fund. The Court of Appeals correctly found that the hearing afforded petitioners on their answer was not prejudicial and, under the circumstances of this case, that petitioners were not deprived of any substantial procedural rights.

1. The record shows that investors believed that they were lending their money, the certificate-bonds which they received being evidence of the debt (R. 106–108), and the Corporation's handling of their money was entirely consistent with that view (R. 113–114). Accordingly, the District Court properly held that, regardless of use in the certificates of the phrase "distributive share", which is consistent with an equity security, the certificate holders should be regarded as creditors. Compare the statement of this Court with respect to other legislation, dealing with the protection of public investors,[9] that: "In the en-

[9] Securities Act of 1933, 48 Stat. 74, as amended.

forcement of an act such as this it is not inappropriate that promoters' offerings be judged as having been what they were represented to be." *S.E.C.* v. *Joiner Corp.*, 320 U.S. 344, 353.

Once the deception had been uncovered, its very nature (and the situation disclosed) necessitated recognition of the Corporation and Trust Fund as a single entity. Although the petition for reorganization was first filed by the Trust Fund alone, the court properly directed, on the basis of the facts brought out in the involuntary bankruptcy proceeding before the same judge, that the Corporation join in the petition, and counsel for the Trust Fund and the Corporation consented (R. 116). As the Court of Appeals pointed out, the evidence showed that "* * * the trustee of the Trust Fund * * * was merely an empty figure * * * completely subservient to the control and direction of the Corporation. Hugh A. Carroll, president of the Corporation, completely dominated and controlled both the Corporation and the Trust Fund" (Pet. 8b). This conclusion is further substantiated by the ease with which Carroll was able to divert the assets of the Trust Fund into the Corporation or his own pocket. (See pp. 5, 8–9, *supra.*)

Courts of bankruptcy are, for many purposes, "essentially courts of equity, and their proceedings inherently proceedings in equity." *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 240. In *Pepper* v. *Litton*, 308 U.S. 295, 312, this Court said, with regard to the necessity of equitable relief against fraud: "No matter how technically legal each step in that scheme may have been, once its basic nature was uncovered it was the

duty of the bankruptcy court in the exercise of its equity jurisdiction to undo it."

The refusal of the courts below to acquiesce in the debtor's fiction of separate entities need not prejudice the certificate holders by subjecting the assets of the Trust Fund to the liabilities of the Corporation (Pet. 12–13). A bankruptcy court has control over the order of payment and, in determining the extent to which a claim in bankruptcy requires rejection or subordination to other claims, will do what is fair and equitable under all the circumstances, "applying federal, not state, law." *Heiser* v. *Woodruff*, 327 U.S. 726, 732; and see *American Insurance Co.* v. *Avon Park*, 311 U.S. 138, 145.

2. The decision of the District Court is not, as petitioners contend (Pet. 9), in conflict with *Selected Investments Corporation* v. *Oklahoma Tax Commission*, 309 P. 2d 267 (Okla., March 12, 1957). The two decisions deal with entirely different legal questions in different factual settings. The action against the Tax Commission was brought for refund of income taxes paid by the Corporation on the earnings of the Trust Fund. The Oklahoma Supreme Court pointed out that the Tax Commission had taken the opposite position with respect to the Corporation since 1930, and the court held applicable the principle that "consistent administrative interpretation of the tax statute would prevail over the contrary interpretation suggested by 'Commission' for the first time more than twenty years later" (309 P. 2d, at 270; Pet. 22b).

The Corporation's proof in support of its case against the Tax Commission was designed to show

that the Corporation was a *legal entity* wholly separate from the Trust Fund. The Oklahoma court's observation that, on the facts before it, "There is nothing to show that this business method or plan was designed or followed for any wrongful or unwholesome purpose" (*ibid;* Pet. 23b) is not in conflict with the holding of the court below. To contend that it is in conflict would be tantamount to a claim that the Oklahoma tax decision is *res judicata* with respect to the fraud, the facts of which were not before the state court, and were not publicly presented until a year later in the bankruptcy proceeding.

The record in the bankruptcy court demonstrates that the Corporation, by its misrepresentation in obtaining investment money and by its manner of handling that money in the Trust Fund, disregarded any separateness of the legal entities. Had the record before the Oklahoma court included the evidence of fraud which was before the courts below, even petitioners recognize that, under Oklahoma law, the decision might well have been the same as that of the bankruptcy court, and appropriately cite from *Mid-Continent Life Insurance Co.* v. *Goforth,* 193 Okla. 314, 316; 143 P. 2d 154, 157, the statement that "Both law and equity, when necessary to circumvent fraud, * * * treat [separate entities] as identical."

3. The decision of the courts below sustaining the Chapter X petition does not conflict with decisions of other courts of appeals or of this Court. Petitioners contend that the Chapter X petition is deficient in that it does not contain, *in haec verba,* "any allegation of bankruptcy or equity insolvency" (Pet. 17).

As shown, the Corporation and Trust Fund were adjudicated bankrupt, on an involuntary petition expressly alleging insolvency, the same day that the petition for reorganization was filed,[10] and both the petition in bankruptcy and the Chapter X petition were heard by the same judge. As the opinion of the Court of Appeals points out: "Although the petition failed to state in categorical terms that the Corporation and the Trust Fund were insolvent or unable to pay their debts as they matured, the fact clearly appeared from the face of the pleading, the involuntary petition in bankruptcy, the report of the audit, and the balance sheet, all of which were specifically referred to in the petition for reorganization" (Pet. 14b). After hearing all the evidence and arguments, the District Court found that the Corporation and Trust Fund were unable to pay their debts as they matured and were, therefore, insolvent (R. 75–76).

Petitioners contend that the decisions of the courts below conflict with the decisions of this Court in *Marine Harbor Properties* v. *Manufacturers Trust* Co., 317 U.S. 78, and *Fidelity Assurance Association* v. *Sims*, 318 U.S. 608 (Pet. 17), in that proponents

[10] Notwithstanding the fact that the Chapter X petition received a different number as in a new proceeding, Sections 126 and 127 of the Bankruptcy Act make it clear that, under the procedural situation then existing, the reorganization petition was necessarily filed in the pending bankruptcy proceeding. Moreover, the petition alleges that certificate owners "are entitled to have the same redeemed * * * after three years from the date of issuance * * * in cash or in kind. That * * * it is impossible to make a division in kind. That it is impossible without liquidating the Trust Fund to pay * * * in cash. That to liquidate the assets of the Trust Fund would cause great loss and irreparable damage" (R. 15–16).

failed to establish "good faith" in the filing of the petition for reorganization. We find nothing in those cases which requires a Chapter X court to hold, as a matter of law, that a petition has not been filed in good faith under Section 146 where, as here, the voluntary petition was filed about a month after a state court receivership had been instituted, the initial approval of the petition was uncontested, the record indicated the need of the numerous protections for public investors which Chapter X provides, and there was no showing that it was unreasonable to expect that a reorganization could be effected.[11] See *General*

[11] In *Marine Harbor*, an attempt was made to institute a Chapter X proceeding where there was a foreclosure pending on behalf of the first mortgage certificate holders pursuant to special state mortgage rehabilitation legislation (Laws of New York, 1933, c. 745). This Court noted that the property of the debtor was worth less than the amount of the first mortgage, that there was no showing of possible value in which junior security holders could participate through reorganization and that, therefore, the safeguards afforded by Chapter X with respect to protecting classes of investors against "improvident, unfair or inequitable adjustments, compromises and settlements" had no special significance in that proceeding (317 U.S. at 87). Approval of the petition would have given "the equity owners a nuisance value wholly unjustified by the reorganization standards which are incorporated into Ch. X" (*Ibid.*, 86). In the case at bar, aside from the other needs to be served by Chapter X, there will be problems among the classes of certificate holders, and between them and other creditors, which were not present in the *Marine Harbor* case. In the *Fidelity* case, this Court noted that the statutory test as to whether a petition meets the requirements of Section 146 must be viewed realistically and concluded that there was no prospect that the debtor could be reorganized. Therefore, the only question presented was whether Chapter X "may be employed to accomplish a slow and orderly liquidation" (318 U.S. at 617). The assets of the debtor were securities which were readily marketable at favorable prices and were in the hands

Stores Corp. v. *Shlensky et al.*, 350 U.S. 462; *Securities and Exchange Commission* v. *United States Realty Improvement Co.*, 310 U.S. 434.

When the Chapter X petition was filed, there was no initial challenge to the petition on the ground that the Oklahoma state court receivership proceedings would "best subserve" the interest of public investors or that reorganization was impossible. Moreover, the need for safeguards provided by Chapter X was already evident. The accountants' report, indicating improper transactions and misconduct by management, and Carroll's effort to control the state receivership proceedings, showed the need for a thorough investigation by an independent trustee, for protection of the security holders through judicial supervision of committees and for the formulation of a plan of reorganization based on full information. After the petition was initially approved, the exposure of Carroll's dealings with the Trust Fund and the Corporation was further developed. The need for

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of public officials in fifteen states whose duty was to liquidate them on the most favorable terms. Objection to the Chapter X petition came from a number of state banking and insurance commissioners and from the state court receivers. This Court found that the interests of creditors would be "best subserved" in the prior state proceedings pending near the homes of the beneficiaries "at a minimum of inconvenience, delay and expense" (*Ibid.* 620). In the present case, neither court below has found it unreasonable to expect that a plan of reorganization can be effected and, in fact, an attempt to reorganize was being made in the state proceeding when the Chapter X petition was filed. In contrast to the situation in *Fidelity*, the significant safeguards provided by Chapter X for public investors in the formulation of reorganization plans make the state proceedings here involved inadequate.

diligent pursuit of claims against officers, directors, affiliated interests and others who may have used control of the Trust Fund for their personal benefit made clear that the interests of public certificate holders would be best served in proceedings in Chapter X. See *Committee* v. *Kent*, 143 F 2d. 684 (C.A. 4). Under all these circumstances, we submit that the evidence before the court adequately supported the approval of the petition as filed in good faith.

Petitioners' contention that *In re Suburban Properties, Inc.*, 110 F. 2d 438 (C.A. 7) conflicts with the decision below is also without merit. As shown above, in the case at bar the record adequately supports the District Court's approval of the petition. The *Suburban* case involved a Chapter X petition filed the day following the debtor's incorporation, and the transfer to it of certain bonds secured by real estate mortgages, foreclosure of which was nearing completion. The Court of Appeals held that the petition should be dismissed, noting that the record completely lacked evidence of the structure and financial history of the debtor, and there were indications that the filing of the petition was unauthorized.

4. Petitioners also contend that the hearing on their answer was "an extraordinary departure from the accepted and usual course of judicial proceedings" (Pet. 17). In the ordinary case, persons answering a petition have the right to hear and cross-examine the witnesses supporting the petition. This case, however, as the Court of Appeals implies in its opinion, is an unusual one. Petitioners did not file a timely answer, but were permitted by the court, in

the exercise of its discretion, to join in a "Petition by Non-Petitioning Creditor to Vacate Adjudication" which was being considered by the court as an answer. The court asked petitioners whether they wished to offer evidence and permitted them to introduce documentary evidence (A. 15a–18a),[11] Petitioners now question the propriety of the court's reliance on facts derived from testimony in examinations conducted by the Trustee pursuant to Sections 21(a) and 167 (11 U.S.C. 44a, 567) on the ground that "These examinations * * * were not in existence when the Chapter X petition was approved and formed no part of the record upon which the District Court acted" (Pet. 16, n. 7). However, when the court overruled petitioners' answer, all evidence in the proceeding was part of the record in the case and it was entirely proper for the court to rely upon it. Petitioners argued on the evidence in the record but made no specific request to have the witnesses who had previously testified made available for cross-examination at the hearing on their answer, and no witnesses were called by petitioners in support of it. We submit that, unlike the situation in *I.C.C.* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 93, under the foregoing unique circumstances the right of petitioners here to "test, explain, or refute" was not denied.

[11] We do not agree with the implication in the opinion of the Court of Appeals that the petitioners were not given "an opportunity to adduce evidence in support of the issues of fact tendered in their pleadings" (Pet. 15b). The record shows, we submit, that this was not the situation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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